Ackerberg v. California Coastal Commission
BS 122006

Tentative Decision on Petition for Writ of Mandate: denied

Petitioners Lisette Ackerberg, individually and as Trustee of the Lisette Ackerberg Trust, and the Lisette Ackerberg Trust (collectively, "Ackerberg") apply for a writ of administrative mandamus overturning the July 8, 2009 decision by Respondent California Coastal Commission ("the Commission") approving a cease and desist order and a notice of violation under the provisions of the California Coastal Act of 1976 ("Coastal Act") (Pub. Resources Code §30000 *et seq.*) The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

Petitioner Ackerberg commenced this proceeding on August 4, 2009. Ackerberg seeks a writ of administrative mandamus directing the California Coastal Commission ("Commission") to vacate and set aside its July 8, 2009 decision approving a cease and desist order and a notice of violation under the provisions of the Coastal Act.

The Petition alleges in pertinent part as follows. Two proceedings under the Coastal Act — one judicial and one administrative — were commenced against Ackerberg to compel her to remove alleged improvements from a vertical public access easement required in 1985 as a condition of improving her Malibu beachfront residence.

On June 19, 2009, the Los Angeles Superior Court entered a judgment in an action (Access for All v. Ackerberg, LASC Case No. BC 405058) (the "judgment") brought by the easement holder, Access for All ("AFA"). The judgment resolved the enforcement matter and providing for the orderly enforcement of the easement.

Thereafter, on July 8, 2009, the Commission approved its own separate administrative cease and desist order.

Ackerberg contends that the Commission's cease and desist order was barred by the stipulated judgment in AFA's litigation under the doctrine of *res judicata*. Petitioner further contends that in conducting its hearing, the Commission committed numerous procedural errors that, viewed separately or together, denied Ackerberg a fair hearing and violated her rights to due process and equal protection. Ackerberg additionally contends that the Commission's decision is not support by legally adequate findings and the findings that it adopted on critical issues are neither supported by the weight of the evidence nor by substantial evidence in the light of the whole record.

B. Standard of Review

CCP section 1094.5 is the administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Topanga Ass'n for a Scenic Community v. County of Los Angeles, ("Topanga") (1974) 11 Cal.3d 506, 514-15. The pertinent issues under section 1094.5 are (1) whether the respondent has proceed without jurisdiction, (2) whether there was a fair trial, and (3) whether there was a prejudicial abuse of discretion. CCP §1094.5(b). An abuse of discretion is established if the respondent has not proceeded in the manner required by law, the decision is not supported by the

findings, or the findings are not supported by the evidence. CCP §1094.5(c).

Section 1094.5 does not in its face specify which cases are subject to independent review of evidentiary findings. Fukuda v. City of Angels, (1999) 20 Cal.4th 805, 811. Instead, that issue was left to the courts. In cases other than those requiring the court to exercise its independent judgment, the substantial evidence test applies. CCP §1094.5(c). "Substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority v. State Personnel Board, (2002) 104 Cal.App.4th 575, 585) or evidence of ponderable legal significance, which is reasonable in nature, credible and of solid value. Mohilef v. Janovici, (1996) 51 Cal.App.4th 267, 305, n.28. The trial court considers all evidence in the administrative record, including evidence that detracts from evidence supporting the agency's decision. California Youth Authority, *supra*, 104 Cal.App.4th at 585.

An agency is presumed to have regularly performed its official duties (Ev. Code §664), and the petitioner seeking administrative mandamus therefore has the burden of proof. Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal.App.2d 129, 137; Afford v. Pierno, (1972) 27 Cal.App.3d 682, 691 ("[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion).

The agency's decision at the hearing must be based on the evidence. Board of Medical Quality Assurance v. Superior Court, (1977) 73 Cal.App.3d 860, 862. The hearing officer is only required to issue findings that give enough explanation so that parties may determine whether, and upon what basis, to review the decision. Topanga, *supra*, 11 Cal.3d at 514-15. Implicit in section 1094.5 is a requirement that the agency set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. Id.

C. Statement of Facts[1]

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[1]Ackerberg asks the court to judicially notice (1) the judgment, (2) declarations submitted by Ackerberg in opposition to a motion for leave to intervene and vacate the judgment, and (3) Land Use Plan ("LUP") Policy P56-16 from the 1986 certified County of Los Angeles Malibu/Santo Monica Mountains Local Coastal Program ("County LCP"). As the Commission argues, the judgment is already part of the administrative record and no judicial notice is required. The declarations could be judicially notice for their existence, but not their truth. *See* Weil & Brown, Civil Procedure Before Trial, §7:15, 7-7, 7-8 (1998). The declarations discuss conversations and meetings and purport to authenticate documents. As such, they are being offered for the truth. The request for judicial notice is denied as to the judgment and declarations. The request is granted for LUP Policy P56-16. Ev. Code §452(b).

Ackerberg separately offers "somewhat duplicative" declarations purporting to authenticate three emails. Petitioner has made no motion to augment the record, and these declarations cannot been considered. However, the Commission apparently included the emails in the record with a caveat that it was not able to authenticate them. If a document is included in the record, it will be received into evidence, whatever qualification the Commission puts on it.

Finally, Ackerberg offers a video excerpt of the Commission's July 8, 2009 hearing. While it seems likely that this video would meet the test of CCP section 1094.5(e), again

1. The 1983 Construction of the Bulkhead

Petitioner Ackerberg owns a beachfront home on Carbon Beach at 22466-22500 Pacific Coast Highway in the City of Malibu (the "property"). In 1983, the Commission granted a coastal development permit ("CDP") for the property's then owner, Ralph Trueblood, to construct a 140 foot long vertical bulkhead between the property and the beach. AR 2-15. The bulkhead would tie-in on its western edge with a previously approved, but not yet constructed, bulkhead of another property owner. AR 3. There would be a 40 foot long return on the east portion of the property. Ibid. The permit required the removal of existing boulders on the seaward side of the bulkhead and replacement with small gravel and waste mix. AR 15. A typical section of the 14 foot bulkhead would extend approximately 2 feet, 6 inches above beach level. Behind the bulkhead, thick filter rock would be installed topped with a blanket of one to two foot rocks, and then a foot of sand. Ibid.

Trueblood constructed the bulkhead and a civil engineer inspected it on December 1, 1983, confirming that it was constructed as planned. He observed man-sized boulders extending a minimum of 10 feet back (landward) from the wall resting on a one foot minimum filter blanket. AR 603-04.

The permit also required Trueblood to record an offer to dedicate a lateral public access and recreational use easement along the shoreline, including all areas from the toe of the bulkhead to the mean high tide line. AR 3. Trueblood recorded the offer which the California State Lands Commission ("State Lands") later accepted (in 2002). AR 438.

2. The Ackerbergs' Purchase of the Property

Trueblood transferred the property to Ackerberg and her husband (now deceased) Norman Ackerberg in February 1984. *See* AR 30. At the time, the property was occupied by a damaged residence, a guest house, a swimming pool, and a lighted tennis court. AR 290-91. The bulkhead built by Trueblood was also on the property. Ibid. None of the development on the property blocked views of the coast or impeded public access to the beach. AR 290-91.

3. The Ackerbergs' CDP Application

In November 1984, the Ackerbergs applied to the Commission for a CDP to demolish the existing structures on the property, construct a new two story residence, garage, pool, and septic system, and renovate the existing tennis court. AR 17. The application proposed to retain the eastern fence along the property line and the existing tennis court light posts, construct a perimeter block wall, relocate the tennis court closer to the eastern property boundary, and install landscaping behind the previously approved seawall. Photos of the site in 1984 show the bulkhead with no boulders on the seaward side, consistent with the 1983 civil engineer's report. AR 289, 291.

Commission staff prepared a report for the permit application recommending approval with a condition requiring recordation of an offer to dedicate a public access easement from Pacific Coast Highway to the shoreline (the "Ackerberg easement"). The Ackerberg easement

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Ackerberg failed to make a motion to augment the record. As a result, the video will not be considered.

would be ten feet wide on the eastern edge of the property and extend from the northern property line to the mean high tide line. AR 39.

The Ackerbergs' attorney submitted a letter objecting to the public easement condition in part because the potential for public access to the beach existed nearby through an easement owned by the County of Los Angeles across private property located at 22550 Pacific Coast Highway ("Malibu Terrace easement"). He contended that the condition be modified to permit abandonment of the Ackerberg easement if the County's accessway was opened, consistent with P51 of the then proposed modifications to the LUP portion of the County LCP. AR 311-12. He also urged that the Ackerbergs be allowed to "use" the area on the property required for easement dedication until "an offer to dedicate is actually accepted." AR 312.

3. The Commission's Conditional Approval of the CDP and the Ackerbergs' Acceptance

The Commission held a public hearing on the Ackerberg CDP application on January 24, 1985. AR 314.1. The Ackerbergs' attorney objected to the Ackerberg easement condition for the reasons stated in his letter. AR 314.9-314.14. The Commission entertained but did not adopt an amending motion to modify the access condition so that development of the Malibu Terrace easement would occur before development of the Ackerberg easement, as the Ackerberg's attorney had requested. AR 314.26. The basis of the motion was that "it is dead wrong" to require the Ackerbergs to provide a public easement while the County "sits there, less than 500 feet away, with a dedicated accessway which they (*sic.*) refuse to open." AR 314.23. The Commission discussed whether a policy should be included in the LUP to the effect that public easements should be developed before private easements (AR 314.37-314.39), and whether "some strong language" should be placed in the findings. AR 314.41. Ultimately, the Commission approved the permit as recommended by staff but with revisions to the findings. AR 314.49-314.50.

Pursuant to this direction, Commission staff revised the findings to add the following:

> The Commission further finds that notwithstanding the fact that the County of Los Angeles owns a vertical accessway within 500 feet of the project, that accessway has not been opened to the public and therefore the Commission cannot make a finding that "adequate access exists nearby." In addition, although the Commission has, in some cases, found that if an accessway is open to the public within 500 feet, new offers of vertical access dedication will not be required, such an approach is not appropriate here. The appropriate vehicle for establishing the policy relative to the precise spacing of vertical accessways and whether previously secured offers to dedicate vertical accessways can be extinguished if another vertical accessway is improved and opened within 500 feet of the subject property is in the LUP. The Malibu LUP recommendation suggests a policy on this point. The Commission believes that as a matter of policy, publicly owned vertical accessways should be improved and opened to public use before additional offers to dedicate vertical access are opened. This position assumes that the publicly owned accessway is within 500 feet of the subject property, that

> it is equally suitable for public use based on management and safety concerns, and that improvements to accomplish public use are feasible. Once a public accessway has been improved and opened for public use, and a suitable policy and mechanism has been developed and adopted to ensure that such a vertical accessway remains open and available for public use and assuming the Commission has approved a policy that outstanding offers to dedicate additional vertical access easements within 500 feet of an opened vertical accessway can then be extinguished, staff will initiate actions to notify affected property owners that they can take steps to extinguish such offers to dedicate. As part of the Commission's public access program, procedures will be developed to implement this directive. AR 323-24.[2]

The Ackerbergs accepted the CDP and agreed to be bound by its terms and conditions including the condition for the Ackerberg easement. AR 343-44. On March 5, 1985, the Ackerbergs executed an irrevocable offer to dedicate the Ackerberg easement and the County Recorder recorded the offer on April 4, 1985. AR 460-79. The Ackerbergs irrevocably offered to dedicate an easement for public pedestrian access to the shoreline along the eastern boundary of the property line. AR 462. The Commission's revised findings were included in the recorded document. AR 476-77.

4. Subsequent Coastal Policy

On December 12, 1986, the Commission certified the LUP portion of the County LCP. LUP Policy P56-16 established an even more generous separation standard for vertical access at Carbon Beach of "one accessway per 1,000 feet of beach frontage," not 500 feet as discussed at the January 24, 1985 hearing. Pet. RJN, Ex. 3. LUP Policy P51 stated: "Where two or more offers of dedication closer to each other than the standard of separation provides have been made pursuant to this policy, the physical improvement and opening to public use of offered accessways sufficient to meet the standard of separation shall result in the abandonment of other unnecessary offers." AR 820.

Malibu incorporated in 1991, and in September 2002, the Commission prepared and certified the City's Local Coastal Program ("Malibu LCP"). The County LCP no longer applied, and County LUP Policy P51 was not included in the City's LCP.[3] The Malibu LCP did include

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[2]Ackerberg describes the Commission's actions as a "commitment" to adopt a policy that publicly owned vertical accessways should be improved and opened to public use before additonal offers to dedicate vertical access easements are opened. Op. Br. at 4. The Commission made no such commitment to Ackerberg. Rather, one Commissioner asked whether staff was committing to putting "some pretty nice language" in the revised findings. AR 314.42. This language concerning development of public easements before private easements was included in the revised findings. But the Commission never committed to adopting a policy to that effect.

[3]This omission may have been because the United States Supreme Court held in Nollan v. California Coastal Commission, (1987) 483 U.S. 825, that public access easements to the beach may not be required as a condition of a CDP in the absence of a constitutionally required nexus

language that reserved to the Commission the authority to extinguish a previously imposed offer to dedicate or grant of an easement. AR 823-24.

5. The Management Plan

On or about December 11, 2003, the Executive Directors of the Commission and Real Party State Coastal Conservancy ("Conservancy"), and AFA, a non-profit organization with whom the Commission and Conservancy work to develop and manage accessways, entered into a "Public Vertical Access Management Plan" ("Management Plan") for Ackerberg's easement. AR 852-54. The Management Plan provided that AFA would accept the Ackerberg's offer to dedicate, survey the easement's boundaries, work with the Ackerbergs to design improvements for the accessway, and operate the Ackerberg easement. It also provided for development of the easement in two phases. In Phase 1, AFA would hire a surveyor to locate the boundaries and identify encroachments within the easement area, informing Commission staff when it does. In Phase 2, after encroachment issues had been resolved, AFA would replace a portion of the perimeter wall with gates and any other necessary improvements, working with the Ackerbergs to design improvements and presenting them to Commission and Conservancy staffs. AR 853. The Plan provided that if AFA failed to carry out its responsibilities pursuant to the Plan, then all right, title, and interest in the Ackerberg easement would vest in the State of California, through the Conservancy. AR 854.

6. AFA's Failure to Enforce and the Stay on Enforcement

On December 18, 2003, AFA notified the Ackerbergs that it had accepted the offer to dedicate and would like to move forward to survey and upon up the easement as soon as mutually convenient. AR 485.

The conservancy authorized a number of grants for AFA relating, in part, to the Ackerberg easement, including funds to conduct a survey and funds to open and improve the accessway. AR 1187, 1189-90, 1195, 1200. Despite these authorizations, AFA spent funds only on the survey and conducted no other work on the Ackerberg easement.

The survey was conducted almost two years after AFA accepted the offer to dedicate. AFA's surveyor found numerous encroachments including a concrete slab, generator and portion of a hedge near the northern end, a nine foot high block wall across the Ackerberg easement parallel to Pacific Coast Highway, four light posts, a post and raised railing near the southern edge of the easement, a portion of another hedge near the southern end, a chain link fence over a wood planter near the southern end, and rip-rap rocks near the southern end of the easement. *See* AR 489. The rip-rap rocks were on the seaward side of the bulkhead. AR 490.

On December 13, 2005, the Commission notified Ackerberg's attorney that all of these encroachments must be removed, and requested that removal occur within 120 days. AR 489. With respect to the rip-rap rocks, the Commission only requested removal of these rocks located within the Ackerberg easement, although it reserved the right to address the remainder of the rocks in the future. AR 490.

Over the next several months, Commission staff and Ackerberg's counsel exchanged

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between the proposed development and the easement.

letters on issues relating to AFA, how the easement would be improved and managed, and the existing improvements. AR 489-504.

On March 29, 2006, Jack Roth ("Roth"), owner of the home adjacent to the Ackerberg easement on its downcoast side, filed an action against the Commission challenging the easement requirement on the basis that he received no notice of the Commission's January 24, 1985 hearing. The Court of Appeal initially stayed any Commission proceedings against Ackerberg. AR 1053. It then ruled in favor of the Commission. *See* AR 1055. The Supreme Court denied review on July 9, 2008. Ibid.

7. The Negotiations Over Enforcement

After the appellate stay was dissolved, in a letter dated October 2, 2008, the Commission notified Ackerberg's counsel that it intended to enforce the Ackerberg easement through a cease and desist proceeding. AR 549-52. On November 14, 2008, Commission staff sent another letter to Ackerberg's counsel, including a draft settlement proposal, and requested a response by November 19, 2008. The letter also notified her that staff had scheduled hearing on a cease and desist order for the December 2008 Commission meeting. AR 562.

In a November 19, 2008, letter, Ackerberg's counsel requested a postponement in order to have more time to respond and advised the Commission that she had begun exploring the opening of the Malibu Terrace easement as an alternative to opening the Ackerberg easement. AR 559-60.

After some additional correspondence, Commission enforcement staff phoned Ackerberg's counsel and advised her that, while staff was willing to work with her, staff needed a settlement that included compliance with the CDP condition of an easement. It would not accept a settlement that exchanged the Ackerberg easement for the Malibu Terrace easement owned by the County which has never been opened in 34 years. AR 580. Staff informed counsel that extinguishing the Ackerberg easement would not comply with the CDP or provide a similar public access benefit. AR 577.

On December 2, 2008, Commission staff sent another letter to Ackerberg's counsel, explaining why the Malibu Terrace easement was not an acceptable substitute. AR 587-590.) After recapping verbal discussions between staff and Ms. Abbitt, staff explained that there was no basis to substitute the Malibu Terrace easement for Ackerberg's, even taking into account the revised findings for the Ackerberg permit. None of the things contemplated by the revised findings had occurred. Indeed, the certified Malibu LCP expressly precludes trading one access for another. AR 588. The Malibu LCP favors opening as many dedicated and accepted public accessways as possible. This specifically requires improving and opening the Ackerberg easement along with four other existing vertical accessways along Carbon Beach. AR 588. The letter observed that the development encroaching on the Ackerberg easement was unpermitted development which required removal whether or not the accessway was ever opened. AR 589. The development along the easement was never approved by the CDP and must be removed. Ibid. At Ackerberg's request, staff again postponed the cease and desist order hearing. Ibid.

Staff wrote to Ackerberg's counsel on December 9, 2008, with information about a review of the permits, explaining that the rock revetment on the site was never approved under

any permit and explaining what had been approved. What was approved was the removal of the large boulders that were in place at the time the 1983 permit was approved for the construction of the bulkhead and the replacement of a smaller rock/gravel mix with rocks a minimum of 3/4 inches in diameter and up to a maximum of 12 inches in diameter to reinforce a portion of the bulkhead. The rock rip-rap that is currently in place on the property is not a part of the bulkhead which from what we can tell from our surveys and photos lies behind the row of shrubs that lie along the seaward edge of the property. The 1983 permit approved the use of small rocks in the construction of the bulkhead, not the large boulders that begin in front of the bulkhead and extend well into the lateral easement area. AR 1151.

8. AFA's Lawsuit Against Ackerberg

On November 24, 2008, Commission staff wrote to AFA in response to its questions. AR 1144. Staff discouraged a lawsuit against Ackerberg at that time, explaining that, after discussions with the Commission's Chief of Enforcement and staff counsel, staff concluded that "filing suit prior to a Commission hearing may not be the best idea. While we are unable to provide legal advice on the matter, there are a few ways in which filing suit prior to a hearing may effect the outcome of our administrative proceedings. First, filing suit may cause the court to place a stay on any administrative proceedings until the resolution of the legal matter. In addition, it may be beneficial to have an administrative record for the courts to review instead of them reviewing the facts of the case de novo." AR 1144.

On January 6, 2009, AFA sued Ackerberg under the Coastal Act in Access for All v. Lisette Ackerberg Trust, et al., LASC Case No. BC 405058. AR 698-711. The complaint alleged that "DEFENDANT' S failure to clear the easement of physical impediments imposes illegal restrictions on the use of this easement by the public, violating the California Coastal Act, resulting in a trespass on PLAINTIFF's easement, and causing a public nuisance" (AR 699), and "On January 1, 2009, the physical impediments located in the easement, including but not limited to an electrical generator, wall, and lighting fixtures had not been removed and PLAINTIFF was unable to open the accessway to the public." AR 701. The prayer requested "injunctive relief mandating DEFENDANT to remove all physical impediments in the easement to ensure the public access to the Property at issue in this Complaint." AR 705. The complaint additionally sought declaratory relief and monetary penalties, as provided in the enforcement provisions of the Coastal Act (Pub. Res. Code, § 30803, 30820(a) and (b)). Ibid.

9. The Commission's Continued Compliance Efforts

Commission staff continued its efforts to secure Ackerberg's compliance through the administrative process. The Commission's Executive Director told Ackerberg's counsel in an email dated April 13, 2009 that there was a major public asset and value at stake here — another public accessway to the beach not readily accessible to members of the public and he did not see any basis for giving away or abandoning such a precious public resource. "The time has come to open this new access-way for public use." AR 1162.

In a follow up email on May 20, 2009, the Executive Director reiterated that staff had made clear that a trade off involving the Ackerberg easement was not acceptable. AR 1164.

Staff scheduled a hearing on the cease and desist order for the Commission's June 2009

meeting. In response to yet another request from Ackerberg's counsel, offering to open the Ackerberg easement if she was unsuccessful in an immediate pursuit of enforcement and opening of the Malibu Terrace easement, staff continued the cease and desist hearing in order to discuss settlement. Staff scheduled a settlement meeting on June 5, 2009. AR 1176.

In a June 3,2009 email, Ackerberg's counsel noted that she Ackerberg had been sued by AFA and requested that AFA's counsel be allowed to attend the meeting. AR 712. She was rebuffed by the Commission. AR 1478-79. At the meeting, Ackerberg's counsel proposed the concept of seeking to open the Malibu Terrace easement as a solution. She was told immediately that the proposal was not acceptable. AR 1479.

On June 3, 2009, the Commission met with AFA to discuss enforcement of violations involving public access easements held by AFA, including the Ackerberg easement. Neither AFA in this meeting, nor Ackerberg's attorney in the June 5 meeting, informed the Commission staff of a possible settlement agreement between AFA and Ackerberg. AR 1204, 1470-71.

10. The Settlement of AFA's Lawsuit Against Ackerberg

AFA and Ackerberg entered into a "Settlement Agreement and Stipulation for Entry of Judgment" to resolve the AFA Lawsuit and alleged Coastal Act violations on June 18, 2009. AR 643-658. On June 19, 2009, the court entered the judgment pursuant to stipulation. AR 635-42. The judgment provided that it was a full settlement of all causes of action stated in the lawsuit, and that: (1) AFA would file an action, funded by Ackerberg, against the County to enforce the County's Malibu Terrace easement; (2) If AFA were successful in obtaining a settlement or final judgment requiring removal of the encroachments currently in the Malibu Terrace access easement, Ackerberg would fund, or cause to be funded, the improvement and opening of that accessway; (3) within 20 days after the easement is improved and opened, Ackerberg and AFA would jointly apply to the Commission to terminate Ackerberg's easement, the decision on which would be left to the Commission; (4) Ackerberg would pay $125,000 in to AFA to maintain and manage the Malibu Terrace easement for five years, and would pay another $125,000 to the Commission for public access and enforcement, but if not accepted by the Commission, then to AFA to fund maintenance and management of the Malibu Terrace easement for ten years; (5) If AFA was not successful in the lawsuit against the County, within 20 days, AFA and Ackerberg would jointly apply to the Commission to amend Ackerberg's 1985 approval to improve Ackerberg's easement for public access and to modify the Management Plan to include security measures that do not interfere with public access. Id.

Pursuant to the judgment, Ackerberg paid AFA's attorneys fees in the action, and on June 26, 2009, AFA filed a new action, AFA v. County of Los Angeles, LASC Case No. BC 416700 to enforce and open the County's access easement. AR 667-90.

On July 6, 2009, the Commission sent an email to AFA stating: "Please tell me it ain't so. I was informed last week that AFA...settled [the] lawsuit by agreeing not to open the access easement until the one held by the county is opened, and that AFA gets a sizeable payment from Ackerberg. If true, I am greatly disappointed and appalled. If true (*sic.*) this is outrageous." AR 1204. The email added that the proposed settlement was never mentioned in the meeting in early June, and the Commission had no notice that it was in the works and no opportunity to weigh in before the court. Ibid.

11. The Cease and Desist Proceeding

On July 8, 2009, the Commission held a cease and desist proceeding against Ackerberg. The Commission had its own staff counsel. AR 1504, 1513.

In connection with the hearing, on June 26, 2009, Commission staff issued a 48-page Staff Report, together with 211 pages of exhibits.[4] The staff report alleged: "The proposed cease and desist order would direct Mrs. Ackerberg to comply with the CDPs, to remove the unpermitted items located within the easement area, and to cease from placing any solid material or structures into the easement area in the future or otherwise interfering with public access, thereby allowing AFA to open the easement to provide the valuable public access that the Commission found was required when it authorized the construction of the current Ackerberg residence and seawall." AR 350. The staff report attached the initial staff report for Ackerberg's 1985 CDP, but not the revised findings actually adopted by the Commission. *See* AR 441.

Three days later, on July 2, 2009, Ackerberg overnighted her response to the staff report to Commission staff and Commissioners at addresses listed on the their website. AR 605-841. Ackerberg argued that her settlement with AFA precluded the Commission from requiring her to comply with her CDP because the judgment was *res judicata* on the issues before the Commission. AR 606-12, there is no seawall violation because the "man-sized boulders" were placed behind the bulkhead (AR 613-14), the Commission's 1985 decision contemplated that the Ackerberg easement would be extinguished if the County's Malibu Terrace easement was opened (AR 615-20), the Malibu Terrace easement is superior anyway (AR 621-23), the enforcement proceeding was premature because the accessway must be the subject of a CDP before its development may occur (AR 623-25), and the hearing violated due process because *inter alia* Ackerberg had insufficient time to respond to the 48-page staff report, the staff report did not include all pertinent evidence, and the time for argument was inadequate. AR 625-27.

On the evening before the Commission's hearing, Commission staff distributed to the Commissioners an Addendum to the Staff Report containing an 18-page reply to Ackerberg's response. AR 917-35. The Addendum stated that the existence of revised findings was a red herring because the preconditions to extinguishing Ackerberg's easement had not been met. (AR 929. The Addendum apparently attached the settlement agreement in the AFA lawsuit against Ackerberg (*see* AR 879-94), but did not include a number of exhibits that Petitioner requested the Commission to consider in her counsel's July 2 submission.[5]

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[4]The staff report failed to include the revised findings and the 1985 transcript from the Ackerberg CDP hearing. *See* AR 441-47 (findings from initial staff report, not revised findings). It also omitted exhibits from an October 21, 2008 letter from Ackerberg's counsel. All of these documents are part of the administrative record.

[5]These include a redline cease and desist order, the judgment, the AFA complaint against the County, a legal memorandum on *res judicata*, a legal memorandum on the Malibu Terrace easement, exhibits on the seawall violation issue, relevant excerpts of the County LUP and Malibu LUP, photographs of the Ackerberg and Malibu Terrance easements, a letter from Ackerberg's counsel to the Conservancy, and excerpts from Ackerberg's approved plans pursuant to the CDP. Op. Br. at 21. All of these documents are in the record.

The Commission also received correspondence from the Sierra Club, Coastwalk and Santa Monica Baykeeper in support of the issuance of a cease and desist order. AR 1209-10, 1217-20, 1223-24. The Sierra Club and Santa Monica Baykeeper strenuously objected to Ackerberg's legal maneuvers and urged the Commission to allow no further delay in opening of the accessway and to issue the cease and desist order. AR 1209, 1223.

At the July 8 hearing, the Attorney General's Office represented the Commission as required by statute for litigation and administrative proceedings. Pub. Res. Code §30334. Prior to the hearing, Ackerberg objected to the deputy attorney general (the "deputy") sitting next to and advising the chair of the Commission in the cease and desist proceeding. AR 626. In response, the Addendum to the Staff Report noted that the deputy is merely a "neutral advisor" in enforcement proceedings, and is not an advocate on either side of this matter. The Addendum further indicated that the deputy had not advised staff regarding its recommendations and did not advocate on behalf of the staff recommendation. AR 935.

During the hearing, the deputy responded to questions posed by various Commissioners. AR 1512-13. When asked about the next step in enforcement if the Commission votes for the cease and desist, the deputy stated that Ackerman would have 30 days to file a court challenge. AR 1512. A Commissioner then asked about the fact that Ackerberg already had a court judgment. The deputy responded, "That is one of their arguments. We don't think it is a legitimate argument." Ibid. The Commissioner then asked whether the State would be taking our (the Commission's) position against Ackerberg in a new court seeing as how another court has approved the settlement. The deputy responded that he did not think there was a hearing in the AFA lawsuit and no court has made a real determination on it. There were a number of options that the deputy would explore, including seeking to intervene and set aside the judgment. AR 1513. When questioned whether these matters would be pursued, the deputy said: "We will, certainly." Ibid.

Ackerberg's attorneys participated in the hearing and provided a PowerPoint presentation. AR 1405-45, 1477-92. The Conservancy spoke in favor of the staff recommendation. AR 1492-94. The Sierra Club and Coastwalk also spoke in favor of the staff recommendation. The Sierra Club urged the Commission to reject Ackerberg's plan to abandon the Ackerberg easement for a non-existent accessway at a different locale. AR 1494-95. Coastwalk testified that vertical access easements are higher priority for coastal access and must be guarded carefully by legal decisions; they are the sole pedestrian egress when high tides and storm conditions dictate and provide rapid safe routes to the coast for emergency personnel. AR 1496-98. Coastwalk observed that lateral easements are rendered useless, even privatized if there are no public vertical rights of way for the public to the coast. AR 1497.

The Commission approved its staff's recommended Notice of Violation CCC-09-NOV-01 and Cease and Desist Order No. CCC-09-CD-01. AR 1515-16. On July 16, 2011, the Commission sent Ackerberg the cease and desist order. AR 1524-29.

D. Governing Law

The Coastal Act requires that anyone who wishes to undertake development in the coastal zone must obtain a CDP. Pub. Res. Code §30600. Anyone who develops without a permit or in violation of the terms and conditions of a permit violates the Coastal Act. Pub. Res. Code

§30820; Cal. Code Regs., tit. 14, §13172. Anyone who violates the Coastal Act may be civilly liable for fines and penalties, exemplary damages, and subject to declaratory and injunctive relief. Pub. Res. Code §§ 30803, 30805, 30820 and 30822.

Any person, including the Commission, may bring an action for violation of permit requirements but any monies recovered go to the Conservancy's Violation Remediation Account, not to the plaintiff. Pub. Res. Code §§ 30803, 30805, and 30823.

In addition to suing for civil liability, the Commission is authorized to pursue violations administratively by issuing cease and desist and restoration orders. Pub. Res. Code §§ 30810, 30811. The Commission's issuance of a cease and desist order may be challenged in a petition for writ of administrative mandate. Pub. Res. Code §30801.

E. Analysis

1. ***Res Judicata***

Ackerberg's principal contention is that the judgment in the AFA lawsuit bars the Commission's proceedings against her pursuant to the doctrine of *res judicata*.

"*Res judicata* describes the preclusive effect of a final judgment on the merits." Mycogen Corp. v. Monsanto Co., ("Mycogen") (2002) 28 Cal.4th 888, 896. "*Res judicata*, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." Ibid. "Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.'" Ibid. (internal citations omitted). "Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action." Id. at 896-97. "[A]ll claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date." Ibid. "*Res judicata* precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." Ibid. (internal citation omitted).

Res judicata applies when "(1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding. Federation of Hillside & Canyon Assns. v. City of Los Angeles, (2004) 126 Cal.App.4th 1180, 1202. Even if these elements are met, *res judicata* will not be applied if injustice would result or if the public interest requires that relitigation not be foreclosed. Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association, ("Citizens") (1998) 60 Cal.App.4th 1053, 1065.

a. The First Element -- Whether the Decision in the AFA Lawsuit Is Final Has Been Waived

In California, an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed. CCP §1049. Thus, a judgment in California is not final for all purposes until all possibility of direct attack thereon by way of (1) appeal, (2) motion for a new trial, or (3) *motion to vacate the judgment has been exhausted*. 20th Century Ins. Co. v. Superior Court, (2001) 90 Cal.App.4th 1247, 1278

(citing Southern Public Utilities District v. Silva, (1956) 47 Cal. 2d 163, 165) (emphasis added.)

There is no final judgment in the AFA lawsuit against Ackerberg. A review of the AFA lawsuit's court docket shows that on September 14, 2009, the Commission and Conservancy filed motions for leave to intervene and to vacate the stipulated judgment in the AFA lawsuit against Ackerberg. Those motions remain pending, and pursuant to stipulation are scheduled to be heard on September 13, 2011. The pending motions constitute a direct attack on the judgment. Since the judgment remains subject to direct attack, it is not final for purposes of *res judicata*.

However, the Commission purports to concede that the judgment is final for purposes of *res judicata*. Opp. at 13. The Commission also has not asked the court to judicially notice the pending motions in the AFA lawsuit. Without evidence or argument to support this issue, it has been waived.

b. The Second Element – The Cease and Desist Proceeding Is on the Same Cause of Action as the AFA Lawsuit

The *res judicata* doctrine is based upon the primary right theory. Id. at 904. "The primary right theory is a theory of code pleading that has long been followed in California. It provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." Crowley v. Katleman, (1994) 8 Cal.4th 666, 681-82. "The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action." Ibid. "As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered." Ibid. "It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: 'Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.'" Ibid. (emphasis in original.) "The primary right must also be distinguished from the *remedy* sought: 'The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.'" (emphasis in original) Ibid.

"The primary right theory . . . is invoked . . . when a plaintiff attempts to divide a primary right and enforce it in two suits. The theory prevents this result by either of two means: (1) if the first suit is still pending when the second is filed, the defendant in the second suit may plead that fact in abatement [citations]; or (2) if the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of *res judicata*." Ibid.

The AFA lawsuit against Ackerberg alleged that she failed to clear the easement of physical impediments, which imposed illegal restrictions on the use of this easement by the public, violating the California Coastal Act, resulting in a trespass on AFA's easement, and causing a public nuisance. On January 1, 2009, these physical impediments included an electrical generator, wall, and lighting fixtures which had not been removed. The prayer requested "injunctive relief mandating that Ackerberg remove all physical impediments in the easement to ensure the public access to the easement.

The Commission's cease and desist enforcement action sought an order directing Ackerberg to comply with the CDP by removing the unpermitted items located within the easement area, and to cease from placing any solid material or structures into the easement area in the future or otherwise interfering with public access, thereby allowing AFA to open the easement to provide the Ackerberg easement.

Plainly, both matters concerned the primary right of a public easement without obstruction, a primary wrong of unpermitted items obstruction the easement, and a remedy of their removal. As such, they are identical. *See* Citizens, *supra*, 60 Cal.App.4th at 1067.

The Commission argues that its cease and desist proceeding sought to compel Ackerberg to remove all unpermitted development within the Ackerberg easement, which Ackerberg did not dispute was unpermitted other than the seawall. Yet, the stipulated judgment merely states that Ackerberg and AFA would seek to extinguish the Ackerberg easement if they succeed in opening the Malibu Terrace easement. It says nothing about removal of unpermitted development. Therefore, the issues are not identical. Opp. at 13.

Ackerberg correctly rebuts this argument in reply by pointing out that it is the complaint which frames the primary right and primary wrong, not the judgment. The relief obtained is not to be confounded with the cause of action, one not being determinative of the other. Consumer Advocacy Group, Inc. v. ExxonMobil Corp., ("Consumer Advocacy") (2008) 168 Cal.App.4th 675, 686.

The cease and desist proceeding and the AFA lawsuit concerned the same cause of action under the primary rights theory.

c. **The Third Element -- The Parties Are Not in Privity**

In the context of a *res judicata* determination, privity " refers to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is sufficiently close so as to justify application of the doctrine of collateral estoppel." Consumer Advocacy, *supra*, 168 Cal.App.4th at 689 (internal citations and punctuation omitted). "The determination of privity depends upon the fairness of binding appellant with the result obtained in earlier proceedings in which it did not participate." Ibid (internal punctuation and citations omitted). Privity is a due process requirement, and whether parties are in privity requires close examination of the particular circumstances of each case. Id. at 689-90.

In some circumstances a person, although not a party, has his interests adequately represented by someone with the same interests who is a party. Id. at 691 (citation omitted.) Among the critical issues such a determination are (a) whether notice of the nature of the action and (b) whether notice of an impending settlement, were provided to the subsequent party. Id. at 691, 693. A party may not abandon its role as representative while preserving privity. Planning and Conservation League v. Castaic Lake Water Agency, (2010) 180 Cal.App.4th 210, 233. Where the interests of the parties are divergent, courts will not infer adequate representation and there is no privity. Citizens, *supra*, 60 Cal.App.4th at 1071.

Ackerberg argues that the Commission was in privity with the AFA. She relies on the fact that AFA was handpicked by the Commission and the Conservancy to hold and manage the

Ackerberg easement, entering into the Management Plan with it, AFA filed a citizen enforcement action against Ackerberg under the Coastal Act, and the Commission knew that AFA had filed the action. Based on these facts, Acerberg concludes that the Commission was in privity with AFA.

In another case, these general facts might support a conclusion of privity. But the privity examination must be a close one, and close examination here shows that the Commission is not in privity with AFA.

True, the Commission and the Conservancy entered into a Management Plan with AFA. But for some reason, AFA did not perform its duties under the Plan. AFA accepted the Ackerbergs offer to dedicate the easement in December 2003. Although the Conservancy authorized a number of grants for AFA relating, in part, to the Ackerberg easement, AFA conducted only the survey for the easement. It conducted no other work on the Ackerberg easement despite being paid to do so.

This circumstance alone is insufficient to show divergence between the Commission and AFA. But it is indicative of what was to come.

In January 2009, AFA sued Ackerberg despite a November 24, 2008 email from Commission staff discouraging AFA from doing so. At this point, AFA's interests began to diverge from that of the Commission and Conservancy.

The Commission had worked through late 2008, and continued to work into 2009, trying to enforce the Ackerberg easement through a cease and desist proceeding. Ackerberg's counsel repeatedly requested postponements. When she advised the Commission that she wanted to try and open the Malibu Terrace easement as an alternative to opening the Ackerberg easement, she was repeatedly informed that the Commission would not accept a settlement that exchanged the Ackerberg easement for the Malibu Terrace easement. In an email dated April 13, 2009, the Commission informed Ackerberg that the easement was a major public asset and "[t]he time has come to open this new access-way for public use."

In response to yet another request from Ackerberg's counsel, staff continued a June 2009 cease and desist hearing in order to discuss settlement. That meeting was unproductive, but it is revealing because neither Ackerberg's counsel on June 5, nor AFA in a June 3 meeting, informed the Commission of a possible settlement of AFA's lawsuit against Ackerberg. Nonetheless, AFA and Ackerberg settled the lawsuit on June 18, 2009.

One of the critical factors to be determined to establish privity based on adequate representation is whether the parties in the first suit provided notice to the parties to be bound of the nature and existence of the lawsuit, and of any a potential settlement. Consumer, *supra*, 168 Cal.App.4th at 691. There is sufficient evidence to conclude that the Commission was aware of the nature of AFA's lawsuit, but it is clear that AFA settled the lawsuit with Ackerberg without notifying the Commission of its terms. Those terms involved the very proposal which the Commission repeatedly rejected when Ackerman's counsel made it: a tradeoff of the Ackerman easement for the Malibu Terrace easement. Had it known of the proposed settlement, there is no doubt that the Commission would have sought to intervene and object to the settlement. The July 6, 2009 email from the Commission to AFA expressing outrage over the settlement proves this.

AFA's failure to give the Commission notice of the proposed settlement by itself

precludes a finding of privity. It simply did not adequately represent the interests of the Commission and the Conservancy.

Additionally, the judgment was not made in the interests of the Commission and the Conservancy. The current Malibu LCP expressly precludes trading one access for another, favoring the opening of as many dedicated and accepted public accessways as possible. This specifically requires improving and opening the Ackerberg easement along with the Malibu Terrace easement. AFA's settlement of the Ackerberg lawsuit is based on a potential exchange of the Ackerberg easement for the Malibu Terrace easement. As such, it is directly contrary to the Malibu LCP. It also disregards AFA's contractual duty under the Management Plan to develop, open, and operate the Ackerberg easement.[6] Nothing in the Plan permits AFA to rely on the opening of the County's Malibu Terrace easement to avoid its duty.[7]

In short, AFA was not in privity with the Commission or Conservancy when it prosecuted the Ackerberg lawsuit and entered into the stipulated judgment. Their interests clearly diverged, and the court cannot infer that AFA adequately represented the Commission and the Conservancy. *Compare* Citizens, *supra*, 60 Cal.App.4th at 1074 (state agency's negotiation and protection of right of public access in settlement resulted in a finding of privity with subsequent public interest group for purposes of *res judicata* on second lawsuit).

d. Public Interest

Ackerberg argues that both the Commission and AFA purport to act as enforcers of the public interest, on behalf of the People of California, citing Consumer, *supra*, 168 Cal.App.4th at 690. Mot. at 15; Reply at 1. Since AFA filed its complaint against Ackerberg under the citizen enforcement provisions of the Coastal Act, it had the same interests as the Commission. Reply at 2.

Not so. AFA's failures discussed *supra* demonstrate that, while it was acting in the public interest in filing the Ackerberg lawsuit, it did not act in the public interest in settling the lawsuit. No matter how Ackerberg argues that the Malibu Terrace easement is better than hers, the fact is that the public is entitled to both. The judgment is pointed towards eliminating the Ackerberg easement in favor of the Malibu Terrace easement, which is directly contrary to the Malibu LCP. The judgment's finding that the settlement is "in the interests of justice" (AR 640) does not purport to set forth what the public interest is, nor could it without involvement of the Commission and the Conservancy.

The stipulated judgment was not in the public interest.

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[6]The Conservancy argues that it has a property interest in the Ackerberg easement and the Management Plan authorizes it to take the easement from AFA if it fails to manage it for public access to the beach. Opp. at 15. This is true, but the Conservancy has not yet exercised this right.

[7]The tradeoff for this disregard of policy and contractual duty is that AFA received the financial benefit of $10,500 in attorney's fees, a role for its attorneys in the lawsuit against the County and payment of AFA's attorney's fees, and probable receipt of $125,000 for management of one of the two easements.

2. Timing of the Enforcement Action

Ackerberg contends that the Commission's proceedings against her were premature in that the easement is not yet ready to be developed. She argues that the Commission's 1985 decision permitted her to use the easement area until it was developed into a public accessway. The Coastal Act requires a CDP for this development, and the Commission, not its staff, has authority to grant a permit. Mot. at 16-17.

This is a *non sequitur*. The cease and desist order requires removal of all unpermitted development within the vertical and lateral public access easements on the property, including rock riprap, a nine foot high wall, concrete slab and generator, fence, railing, planter, light posts, staircase, and landscaping. AR 1526. The 1985 decision permitted Ackerberg to use the easement area; it did not permit her to construct improvements on it. The Ackerbergs attorney asked that they be allowed to use the easement strip for patio or planting or whatever, certainly no improved structure...until the property is picked up." *See* AR 380.[8] The items that have been constructed in the easement are unpermitted. Pursuant to the CDP, Ackerberg is perfectly free to use the area until the easement is opened, but she is not free to construct unpermitted improvements.

The cease and desist order was not premature.

3. Fairness/Due Process

Ackerberg alleges that the Commission denied her due process and a fair administrative hearing.

First, Ackerberg argues that the deputy acted impermissibly in the role of both purportedly neutral advisor to the Commission and prosecutor, thus denying her a fair hearing pursuant to Nightlife Partners, Ltd. v. City of Beverly Hills, (2003) 108 Cal.App.4th 81.

The court has examined the record. There is no evidence that the deputy attorney general acted as any sort of "prosecutor." To the contrary, the deputy simply responded to questions posed by various Commissioners, which is precisely the role of a neutral advisor. No advocacy took place.

Ackerberg points out that the deputy sat next to the Commission's Chair, rather than at counsel table. Mot. at 19. She does not explain why this seating arrangement undermines neutrality or shows bias. Indeed, one would expect the Commission's neutral legal advisor to sit near the Commission and away from advocates.

Petitioner further argues that the deputy's responses to questions included the following statements: "That is one of [Ackerberg's] arguments. We don't think it is a legitimate argument." The deputy also stated that he did not think there was a hearing in the AFA lawsuit and no court had made a real determination on it. When questioned whether the Commission would explore intervention and setting aside the judgment in the AFA lawsuit, the deputy responded: "We will, certainly."

None of these statements were outside the deputy's role as the Commission's legal advisor. The colloquy began when the deputy was asked by a Commissioner what the next step

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[8]Ackerberg's reply contends that page 380 contains a reference by her attorney to a tennis court, but the court could find no such reference on that page. *See* Reply at 4.

in enforcement would be if the cease and desist order issued. The deputy responded, explaining Ackerman's right to file a court challenge. The deputy then what position the Commission would take concerning the AFA lawsuit judgment -- that it was not legitimate -- and why. He also promised to explore options with respect to the AFA lawsuit, including intervention and a motion to vacate the judgment. Thus, all of the responses were to questions concerning the Commission's legal rights in the event that it issued the cease and desist order. This is exactly what a legal advisor does, and did not turn the deputy into a prosecutor in the cease and desist proceeding. Indeed, it could not since the questions all assumed that the cease and desist order would be issued.

Next, Ackerberg argues that the Commission's staff failed to present all of the evidence, including that favorable to her position, in the staff report and addendum. Ackerberg cites no pertinent authority for this position. She merely cites a criminal case holding that a prosecutor must disclose (not present, only disclose) exculpatory evidence (Brady v. Maryland, 373 U.S. 83) and a civil case holding that due process requires that a person seeking renewal of a licensee be given a full opportunity to present a defense. (Bank of America v. City of Long Beach, (1975) 50 Cal.App.3d 882, 886.

Assuming that the Commission's staff has a duty to present all pertinent evidence to the Commission, Ackerberg was represented by counsel at the hearing. Her counsel sent all of the exhibits to the Commission which she claims the staff left out of its report, a point which staff noted in the staff addendum. AR 843. The Commission had all the pertinent evidence, and Ackerberg could have sought a continuance if it was clear that the Commissioners did not have time to read and evaluate it. She did not do so.

Finally, Petitioner contends that she did not have sufficient time to argue her case as she was limited to 20 minutes. Ackerberg complains about the fact that prior to the hearing, Commission staff took the position (through its staff report) that the 1985 revised findings were never adopted, but changed course at the hearing.

This did not amount to a denial of due process. Rather, that is just how adversarial proceedings go sometimes. Parties make concessions, issues change, and sometimes the decision-maker wants the parties to focus on an issue that may not have seemed important. There was nothing legally "unfair" about it. Ackerberg had the same amount of time as Commission staff. The transcript does not show that her attorneys were cut off for exceeding her time limit, and she did not ask for additional time. *See* AR 1490, 1492. Ackerberg argues that staff had additional time for rebuttal, but that is the nature of a prosecution of any kind; the moving party gets the last work. In fact, the rebuttal takes only five pages of transcript. AR 1502-06.

The Commission's hearing on the cease and desist order comported with due process.

4. Sufficiency of the Evidence

Finally, Ackerberg argues that there is not substantial evidence in the record to support the Commission's decision.

The Commission correctly observes that Ackerberg cannot challenge the Commission's issuance of the cease and desist order on grounds that some of the development predated her 1984 permit. A vested rights application is required in order to raise vested rights as a defense.

LT-WR, LLC v. California Coastal Commission, (2007) 151 Cal.App.4th 770, 784-785. Ackerberg never sought a vested rights determination, which is necessary to establish that her development predated the Coastal Act and therefore did not require a permit.

In reply, Ackerberg denies that she is raising a vested rights issue. Reply at 8. Instead, her argument apparently is that certain improvements pre-date the CDP, and the Commission promised her that she could use the easement strip as it was. Mot. at 4, 8.

Neither the 1983 Trueblood CDP nor the 1985 Ackerberg CDP authorized the development which Ackerberg now claims. Neither permit authorized the currently existing tennis court lights, perimeter wall, fence and railing, or landscaping. AR 3 (Trueblood project description), 33, 35 (plans for Ackerberg development showing tennis court with no lights, no fencing, no nine foot perimeter wall). Ackerberg argues that the aerial photos show that Trueblood had a tennis court, lights, a wall, and riprap (large boulders). Reply at 8. That some of these type of items exist in a pre-1985 photo does not mean they are the same items. In fact, it is obvious that the tennis court was renovated, new lights were put in, and the nine foot wall was added. All of this development was added by the Ackerbergs, is unpermitted, and must be removed in the easement area.

The other issue Ackerberg raises concerns the large rip-rap boulders located seaward of the approved bulkhead. *See* AR 1427. In 1983 the Commission authorized Trueblood to construct a 140 foot bulkhead on the property. AR 2-15. The approved development included the removal of existing boulders on the seaward side of the bulkhead and replacement with small gravel and waste mix. AR 15. The permit provided that the bulkhead would extend approximately 2 feet 6 inches above beach level. Behind the bulkhead thick filter rock would be installed topped with large boulders. AR 15. A civil engineer inspected the bulkhead for Trueblood on December 1, 1983, and confirmed it was constructed as planned, including "man size"[9] boulders extending a minimum of 10 feet back (landward) from the wall resting on a 1 foot minimum filter blanket. AR 603-04. A geologic report dated December 21, 1983, for the Ackerberg's proposed development depicted the existing bulkhead in relation to the site. AR 282. Ackerberg's architect sent a letter to the State Lands Commission on October 31, 1984, providing a stringline map dated that same date and two aerial photographs of the site. AR 287-292. The stringline map shows the existing bulkhead in relation to the tennis court and the aerial photographs show the constructed bulkhead with some boulders seaward of the bulkhead, but not the line of boulders that currently exists (*compare* AR 291 *and* 1427) and no vegetation landward of it. AR 291.

Ackerberg contends that the "typical section" (AR 15) depicts large rocks that abut and buttress the seaward face of the bulkhead, interspersed with rock and gravel waste mix. This is true. The typical section does indeed depict some large rocks, along with the notation that said rocks/boulders are to be replaced with rock & gravel wastemix, 3/4" to 12". AR 15. There are supposed to be no large rocks or boulders seaward of the wall. The engineer's "replace existing boulders" notation has an arrow pointing to the large rocks. Simply stated, there should be no large rocks in front of the seawall.

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[9]The court notes that, at least to a layperson, the term "man size" is a misnomer for rocks that are one to two feet in diameter.

Petitioner argues that the rock and gravel mix in front of the bulkhead would be washed away in a storm, and it makes no sense to use them without large rocks on the seaward side, citing to an email from a Commission staff intern. Mot. at 23. She also points to the plans for Trueblood's bulkhead, contending that they show rocks below sand level on the seaward side. She then argues that the west end of Carbon Beach has been eroding, and the rocks placed below the sand on the seaward side can now be observed. Ibid.

This argument is frivolous. Not is there no evidence of beach erosion, the photos shows that the boulders on the seaward side of the bulkhead are decorative, and have not been exposed by erosion of sand from the beach. AR 1441. Indeed, if the beach had eroded, the bulkhead would be higher. The bulkhead is not any higher in the photos than it was in 1984. *Compare* AR 1441 *and* 291.

In any event, substantial evidence supports the Commission's decision that the improvements subject to the cease and desist order were added by the Ackerbergs and must be removed.

E. Conclusion

There is no merit to any of Ackerberg's contentions. Petitioner has avoided her obligations with respect to the easement for 26 years. As the Commission stated: "The time has come to open this new access-way for public use." The cease and desist order is not barred by *res judicata*, and was not premature. Ackerberg was afforded due process and a fair hearing. Finally, the Commission's decision is supported by substantial evidence in the record.

Respondents' counsel is ordered to prepare a proposed judgment, serve it on the Ackerberg's counsel for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for July 29, 2011.